

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Connersville, Madison, and Richmond, Indiana,)
Erlanger and Lebanon, Kentucky, and Norwood,)
Ohio; and Lebanon, Lebanon Junction, New)
Haven, and Springfield, Kentucky))

MB Docket No. 05-17
RM-11113
RM-11114

To: Office of the Secretary
Attn: Assistant Chief, Audio Division,
Media Bureau

PETITION FOR RECONSIDERATION

Newberry Broadcasting, Inc., licensee of Station WHHT(FM), Horse Cave, KY; Elizabethtown CBC, Inc., licensee of Stations WKMO(FM), Hodgenville, KY and WTHX(FM), Lebanon Junction, KY; CBC of Marion County, Inc., licensee of Station WAKY-FM, Springfield, KY; and Cumulus Licensing, LLC, licensee of Stations WNFN(FM), Belle Meade, TN, WWTN(FM), Manchester, TN, WQQK(FM), Hendersonville, TN and WRQQ(FM), Goodlettsville, TN (the "Joint Parties"), by their respective counsel, hereby submit this Petition for Reconsideration in response to the *Report and Order* ("R&O") (DA05-3027, rel. 11/25/05),¹ in the above-captioned proceeding. The R&O dismissed the Joint Parties' proposal due to a short spacing between an existing Class C station and a pending, prior filed application. However, the Commission erred in holding that this triggering application must be protected by the Class C station that it triggers when that Class C station is not proposing to change its licensed facilities and the triggering application is filed contingent on the Class C station becoming a Class C0

¹ The R&O was published in the Federal Register on December 14, 2005 which sets the deadline for a petition for reconsideration at January 13, 2006. See 70 Fed. Reg. 73941.

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station. Nevertheless, the Joint Parties believe the public interest would be served by amending the proposal to eliminate this short spacing in view of the absence of any adversely affected parties, the current freeze on refiling the petition and the lack of any clear law or policy under the particular circumstances of this “short spacing” issue. This Petition for Reconsideration meets the standards under Section 1.429 of the Commission’s Rules. *See* 47 C.F.R. § 1.429. As discussed below, the Bureau’s decision is not based on any clear law or policy and constitutes decisional error. In addition, as will be discussed, circumstances have changed allowing the Commission to consider an amendment to the Joint Parties’ proposal. This amendment cures the alleged defect and will provide several public interest benefits. *See* Sec. 1.429(b) of the Commission’s Rules. The Joint Parties urge the Commission to issue a Notice of Proposed Rule Making (NPRM) on the amended proposal in order to provide for, *inter alia*, two first local services.² In support hereof, the Joint Parties state as follows:

I. SHORT SPACINGS CREATED BY TRIGGERING APPLICATIONS ARE DIFFERENT THAN SHORT SPACINGS TO PRIOR FILED APPLICATIONS.

1. On March 21, 2005, the Joint Parties filed an Amended Proposal to a portion of the *NPRM*³, which was under consideration in this docket. The Joint Parties recognized that under the *Taccoa, Georgia*⁴ policy, the Commission would institute a new docketed proceeding and issue a *NPRM* for the Amended Proposal. The Joint Parties’ Amended Proposal was not opposed and it offered a first local service to two communities and an overall net gain in coverage area. All communities and loss areas remain well served. The only technical issue raised by the Commission was a purported “short spacing” created by the reallocation of Channel

² *See Coolidge and Gilbert, Arizona*, 10 FCC Rcd 7701, note 2 (MMB 1995). In *Coolidge*, the Commission considered the proponent’s petition for reconsideration as a petition for rule making and released proponent’s amended proposal on public notice “in order to streamline and expedite allotment processing.”

³ 20 FCC Rcd 1272 (MB 2005)

⁴ *Taccoa, Georgia, et al.*, 16 FCC Rcd 21191 (MMB 2001).

259C from Manchester to Hendersonville, Tennessee to a pending triggering application by Station WRJL-FM, Eva, Alabama (BPH-20031009AAY). The Eva application could only be granted if Station WWTN's licensed facilities are reclassified to Class C0. Station WWTN had filed an application (BPH-20040827ACB) for Class C status which is currently pending.

2. As is the case with all triggering applications, the Eva application is short spaced to the licensed facilities of Station WWTN as a Class C station and is therefore filed *contingent* on Station WWTN becoming a Class C0 station. The *R&O* did not provide any analysis or explanation for its finding that "the reallocation of pre-1964 grandfathered Station WWTN, Channel 259C from Manchester to Hendersonville (sic) is short spaced to a pending modification application for Station WRJF(FM) (sic), Channel 260C3, Eva, Alabama."⁵ In fact, Station WWTN did not propose to change its licensed facilities as a Class C station. The only proposed change was the community of license. Thus, the WWTN proposal *could not* create a short spacing to the pending Eva application.

3. Where there is no change in transmitter site nor class of station, a new short spacing cannot be created. Indeed, the short spacing had already been created by the triggering Eva, Alabama application to the licensed facilities of Station WWTN. Although Commission rules require that prior filed applications are to be protected⁶, the nature of the triggering application is distinguishable from the typical prior filed cut-off minor change application. The difference is demonstrated by the fact that Class C stations are permitted to file applications that specify a new transmitter site without regard to any spacing protection to the triggering application. In all other situations, the prior filed application would be protected. Here, Station WWTN filed an acceptable application for Class C status at a site which is short spaced to the

⁵ The correct community is Hendersonville, TN. The correct call letters are WRJL-FM.

⁶ 47 CFR §73.3573

prior filed Eva application. Such an application could not have been filed if the prior filed Eva application was accorded cut-off protection. But the *difference* is that triggering applications, unlike other minor change applications, are, by their nature, *contingent* applications, i.e., they are contingent on the licensed facilities becoming Class C0. The triggering application must protect the Class C licensed facilities until the station is reclassified to Class C0. When the licensed facilities are not proposed to be changed, the triggering application remains *contingent*.

4. Similarly, Station WWTN's proposed change in community of license which does not involve a site change should be able to be filed without regard to the protection otherwise accorded to a prior filed application. It would be inconsistent for the Commission to hold that a Class C site change application can be filed short spaced to a triggering application but a request for a new community of license with no change in site is short spaced to the same triggering application. The Joint Parties have found no cases which would provide guidance as to how the Commission has handled such proposals by Class C stations during the triggering process. Therefore, the Commission should clarify its finding even though the Joint Parties are willing to remedy the short spacing instead.

II. THE JOINT PARTIES ARE PROPOSING AN AMENDMENT THAT WILL CURE THE ALLEGED DEFECT.

5. The Joint Parties are proposing to "cure" this perceived defect and allow the Eva application to be granted by dismissing the Station WWTN Class C application.⁷ See Exhibit 1. If WWTN is treated as a Class C0 station, there would be no impediment for the Commission to consider the Joint Parties' Amended Proposal.

⁷ Cumulus dismissed the WWTN Class C application (BPH20040827ACB) on January 13, 2006, and accepted Class C0 facilities instead.

6. As indicated in the attached Technical Report, Channel 259C0 can be allotted to Hendersonville, TN and comply with the spacing requirements to all other authorizations or vacant allotments except the pre-1964 grandfathered short spacing to Station WRLT(FM), Franklin, TN. As for Station, WRLT, the Commission has held that a station with a Sec. 73.213 short spacing may change its city of license as long as: (i) no additional short spacing is created; (ii) no existing short spacing is exacerbated, and (iii) the potential for interference is not increased. See *Kankakee and Park Forest, IL*, 16 FCC Rcd 6768 (2001); *Killeen and Cedar Park, TX*, 15 FCC Rcd 1945 (2000); *Oceanside and Encinitas, CA*, 14 FCC Rcd 15302 (1999); *Fremont and Holton, MI*, 14 FCC Rcd 17108 (1999); *Newnan and Peachtree City, GA*, 7 FCC Rcd 6307 (1992). Here, in addition to complying with all three prerequisites, the short spacing is decreased. See attached Channel Study E7A.

7. In addition, there will be a net gain of 64,285 persons in an area of 2,049 square kilometers with no loss area, from the reduction in class because maximum Class C0 facilities are used instead of the current actual Class C facilities which offer less coverage.

8. The FCC can accept amendments to proposals that are in the public interest where no prejudice would result to any other party from the proposed amendment. See *Centre Hall, Pennsylvania, et al.*, 20 FCC Rcd 458, note 2 (2005); *Pikeville, Kentucky, et al.*, 6 FCC Rcd 3732, ¶6, note 5 (1991).⁸ The *Pikeville* case is similar to the facts in this case. There the proponent admitted error by specifying a Class B1 rather than a Class C3 in its original proposal,

⁸ In *Centre Hall*, the Commission permitted the proponent to amend its proposal because of a change in Commission policy, where “no prejudice would result from accepting the amendment.” The Commission also routinely accepts late filed comments where there is no adverse impact on any other proposal. See e.g., *Willows, California*, 11 FCC Rcd 9180 (1996); *Bagdad and Chino Valley, Arizona*, 11 FCC Rcd 14459 (1996); *Horseshoe Beach and Otter Creek, Florida*, 13 FCC Rcd 12703 (1998); *Weaverville, California*, 12 FCC Rcd 2965 (1997); *Lake Havasu City, Arizona*, 10 FCC Rcd 6522 (1995); *Christiansted, Virgin Islands*, 10 FCC Rcd 8078 (1995); *Patterson, California*, 7 FCC Rcd 1719 (1992); *Keokuk and Washington, Iowa*, 6 FCC Rcd 364 (1991); *Weston and Webster Springs, West Virginia*, 5 FCC Rcd 1006 (1990); *Vancouver, Washington, Coos Bay and Corvallis, Oregon*, 4 FCC Rcd 839 (1989).

which violated the Commission's Rules. However, instead of dismissing the proposal, the FCC permitted the proponent to amend to specify a Class C3 channel because "no prejudice could result to any party from this amendment." 6 FCC Rcd at note 5. Here, the Joint Parties are asking the Commission to amend its proposal for Station WWTN(FM) to specify Channel 259C0 instead of Channel 259C. This will not prejudice any other party because it has no bearing on the grant of any other proposal in this proceeding. In addition, the Joint Parties' amendment is in the public interest because it will provide first local services at Millersville, Tennessee, and New Haven, Kentucky.⁹

III. THE FCC SHOULD SEVER RODGERS BROADCASTING CORPORATION'S PROPOSAL SO THAT IT CAN BECOME FINAL.

9. The Joint Parties are filing a separate Request to Sever this proposal from the one filed by Rodgers Broadcasting Corporation ("RBC") in this proceeding, which was granted by the *R&O*. The connection between RBC's proposal and the Joint Parties' proposal was a proposed change to Station WLSK(FM), Lebanon, Kentucky. Both RBC and the Joint Parties requested that Channel 265C3 be downgraded to Ch. 265A at the same transmitter site. The only difference was that the Joint Parties' also requested a new community of license, Springfield, Kentucky. In the *R&O*, the Commission granted RBC's proposal to substitute Channel 265A for 265C3 at Lebanon.

10. This Petition for Reconsideration, does not conflict with the Commission's decision to substitute Channel 265A for 265C3 because Station WLSK(FM) will remain the same if the Station is licensed to Lebanon or Springfield. Also, for contractual reasons, CBC of Marion County, Inc. must implement the downgrade to Station WLSK(FM). Should the

⁹ As discussed above, due to the freeze on the filing of rule making petitions, the Joint Parties cannot currently refile their proposal. Thus, if the Commission denies this reconsideration, the communities of Millersville, Tennessee, and New Haven, Kentucky may never receive first local service.

Commission accept the Joint Parties proposal and issue a NPRM, under the *Taccoa, GA* case, *supra.*, a new docket will be instituted and thereby allow this docketed proceeding to be closed. Therefore, the Commission should sever RBC's proposal from this proceeding so that it can become final. To do otherwise, will keep a cloud of uncertainty hanging over RBC's ability to implement its proposal.

IV. CONCLUSION

The Joint Parties have demonstrated that the Commission erred in failing to recognize that the purported short spaced application was different than a typical minor change cut off application and that the proposal to change Station WWTN's city of license at its current site did not and could not create a short spacing to a prior filed application entitled to the type of protection accorded by the Commission's decision. Nevertheless the Joint Parties have amended their proposal to eliminate this short spacing concern and have separately accepted Class C0 status for the station. As a result the cited impediment to the issuance of a NPRM no longer exists clearing the way for the eventual adoption of the Joint Parties proposal. Thus, the Joint Parties urge the Commission to issue a NPRM as expeditiously as possible and to sever the RBC proposal.

NEWBERRY BROADCASTING, INC.
ELIZABETHTOWN CBC, INC.
CBC OF MARION COUNTY, INC.
WASHINGTON COUNTY CBC, INC.

By: 

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Michael H. Shacter
Womble Carlyle Sandridge & Rice
1401 Eye Street, NW
Seventh Floor
Washington DC 20005
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Their Counsel

January 13, 2006

Respectfully Submitted,

CUMULUS LICENSING LLC

By: 

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Scott Woodworth
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1455 Pennsylvania Ave, NW
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(202) 639-6500

Its Counsel

TECHNICAL REPORT

This **Technical Report** has been developed in support of a petition for reconsideration of the Commission's dismissal of an amendment to a proposed rulemaking in MB Docket No. 05-17, RM-11114. This proposal used the licensed site of station WWTN at Manchester, TN, and requested a change in community of license. The Commission dismissed the proposal because of a short-spacing to that site created by a C0 declass triggering application by station WRJL-FM at Eva, AL (BPH-20031009AAY).

The Eva, AL Short-spacing is Cured by the Declass of WWTN:

Cumulus Licensing has agreed to the voluntary declass of station WWTN to 259C0 thereby eliminating the short-spacing. The proposal is changed accordingly, and a site specification is proposed for WWTN on 259C0 to provide a uniform 59.1 km maximum class C0 70 dBu that encompasses the entire Hendersonville city boundaries. A channel study is included as exhibit E7A. WWTN is a pre-1964 grandfathered short-spaced station with respect to station WRLT on channel 261A. The WWTN site proposed herein decreases that short-spacing as permitted by Commission policy in a rule making context. Exhibit E7B demonstrates 70 dBu coverage of Hendersonville, and E7C shows line of sight to the community.

WWTN Population and area:

The proposed WWTN channel 259 maximum class C0 allocation results in a population gain of 64,285 in an area of 2,049.5 sq km when compared to the licensed

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WWTN facility. There is no loss area (see E7D). The gain area is well served by five or more full-time aural signals.

IA. Updated Summary of Allocations Changes for WNFN 294C3, Millersville
Only WWTN is changed:

<u>Community</u>	<u>Existing</u>	<u>Proposed</u>	<u>Coordinates</u>
Millersville, TN	-----	294C3 (WNFN)	N36-26-24 W86-37-39
Horse Cave, KY	294A	293A (WHHT)	N37-13-57 W85-52-06 (WHHT Licensed site)
Hodgenville, KY	292A	297A (WKMO)	N37-40-34 W85-40-57
Lebanon Junction, KY	297A	257A (WTHX)	N37-44-37 W85-38-52
Belle Meade, TN	294A	246C2 (WRQQ)	N36-17-50 W 86-45-11 (WRQQ licensed site)
Goodlettsville, TN	246C2	221A (WQQK)	N36-17-50 W86-45-11 (WQQK licensed site)
Hendersonville, TN	221A	259C0 (WWTN)	N35-50-07 W86-29-30 ¹
Manchester, TN	259C, 268A	268A (WFTZ)	

IB. Summary of changes required for WAKY-FM New Haven, KY :

<u>Community</u>	<u>Existing</u>	<u>Proposed</u>	<u>Coordinates</u>
New Haven, KY	----	274A (WAKY)	N37-46-07 W85-35-57
Springfield, KY	274A	265A (WLSK)	N37-38-50 W85-11-50
Lebanon, KY	265C3	-----	

¹ There is a considerable area within which WWTN's 259C0 may be located including a northern most site at N 35-57-34 W 86-25-24. Sites in this area will decrease the short-spacing to WRLT on 261A.

Summary of Gain and Loss Areas and Populations (updated for WWTN only):

A summary of the gain and loss areas for all allocation changes including site moves is provided below.

<u>Station-Allocation</u>	<u>Pop. Gain</u>	<u>Loss</u>	<u>Net</u>	<u>Area Gain</u>	<u>Loss</u>	<u>Net</u>
(1) WNFN	220,094	316,662	-96,568	3,735	1,310	+2,425
(2) WKMO	16,276	19,505	-3,229	296	296	0
(3) WTHX	35,272	42,736	-7,464	881	881	0
(4) WAKY-FM	71,359	23,757	47,602	1,416	1,416	0
(5) WLSK	196	57,398	-57,202	20	2,320	-2,300
(6) WWTN	64,285	0	64,285	2,049.5	0	2,049.5
	407,482	460,058	-52,576	8,397.5	6,223	2,174.5

The sum of the allocation changes results in a 60 dBu population loss of 52,576 and a gain in area served of 2,174.5 square kilometers. Stations WRQQ, WQQK and WHHT remain at their licensed sites and do not impact the gains and losses.

All allocation studies were conducted utilizing V-Soft's FMCOMMANDER and PROBE III software and the VSOF 30 second terrain database. All Census data is year 2000 and the city boundaries were developed using the U.S. Census 2000 Tiger mapping data. Existing service studies utilized licensed contours for class C, noncommercial and AM stations and maximum class circular contours for all other class of FM stations.

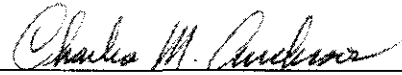
IV. Conclusion:

Station WWTN is declassified to 259C0 with a site specification. No other changes are made to the original amended proposal.

It is concluded that the proposed reallocations meet all applicable Commission rules and policies, and will provide first local services at Millersville, TN (5,308) with an

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increase in area served of 2,425 square kilometers (+103%) and New Haven, KY (849)
with an increase in population served of 47,602 (+76%).



Charles M. Anderson January 12, 2006
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E7A WWTN - HENDERSONVILLE CHANNEL STUDY

REFERENCE

35 50 07 N.

86 29 30 W.

CLASS = C0

Current Spacings

DISPLAY DATES

DATA 01-03-06

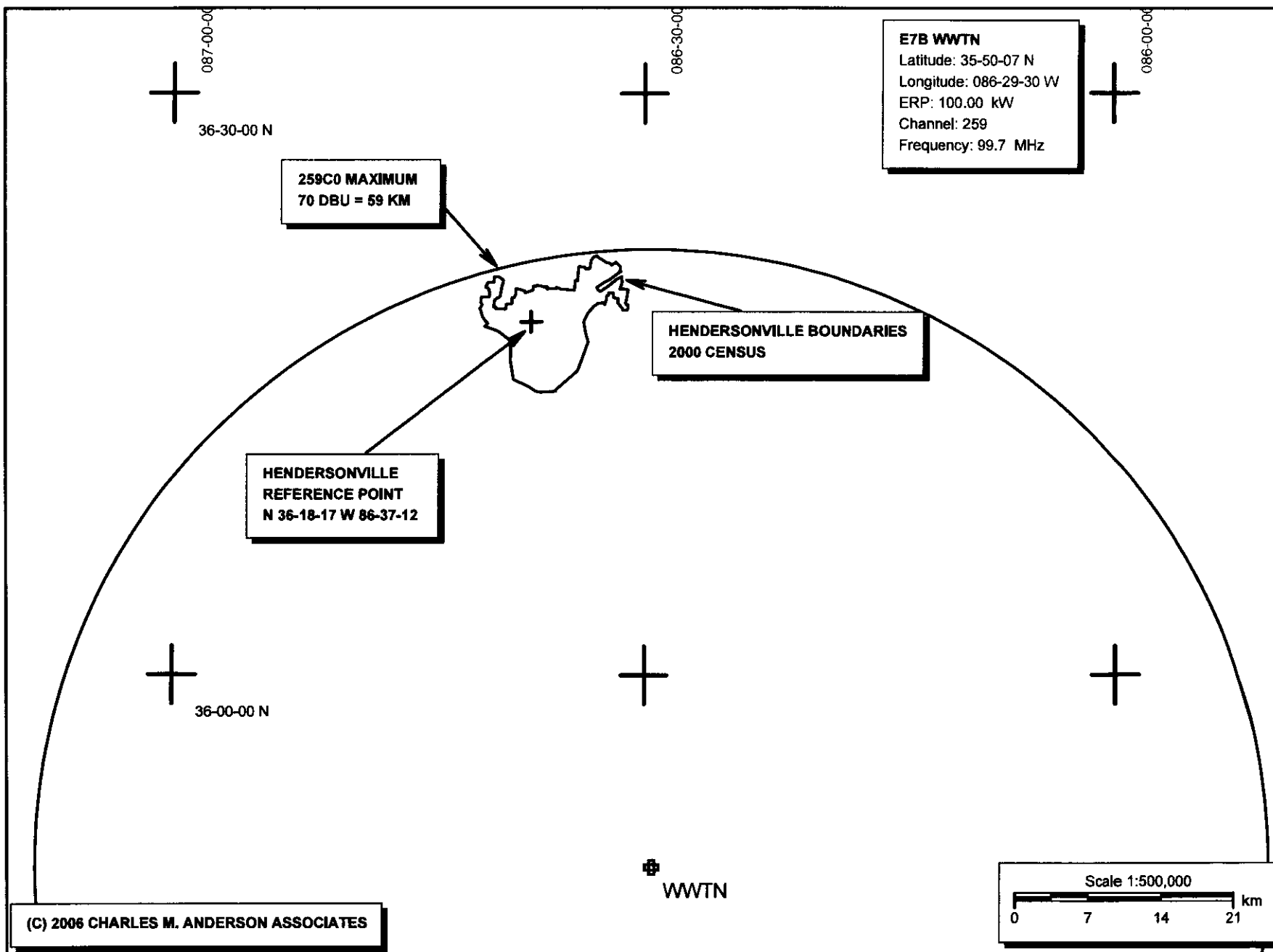
SEARCH 01-04-06

----- Channel 259 - 99.7 MHz -----

Call	Channel	Location	Azi	Dist	FCC	Margin
RADD	ADD 259C	Hendersonville	TN 235.3	3.47	280.5	-277.03
RDEL	DEL 259C	Manchester	TN 235.3	3.47	280.5	-277.03
WWTN	LIC 259C	Manchester	TN 235.3	3.47	280.5	-277.03
WWTN.A	APP 259C	Manchester	TN 250.1	8.64	280.5	-271.86
WRLT	LIC 261A	Franklin	TN 304.8	39.07 (1)	85.5	-46.43

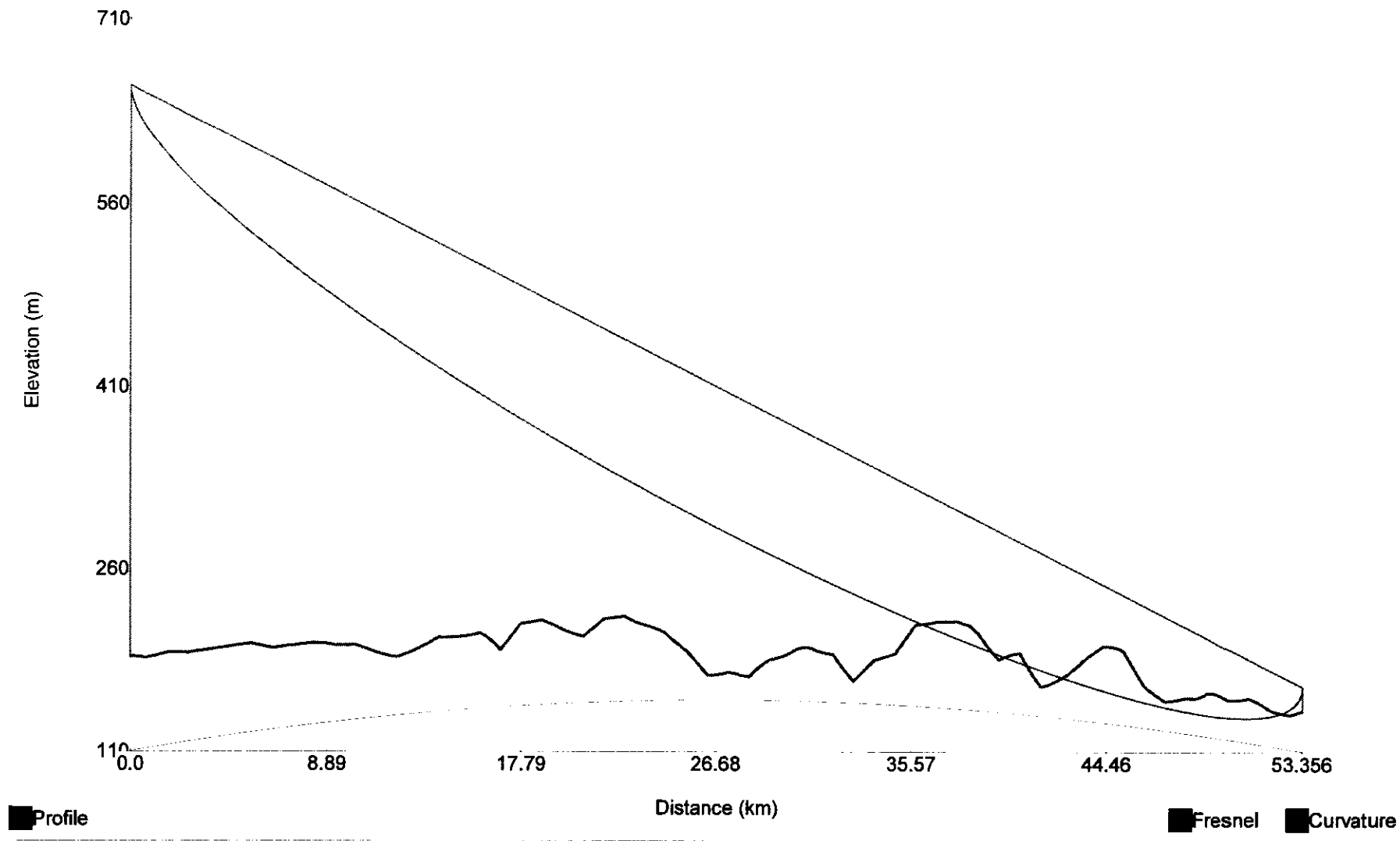
(1) Pre 1964 grandfathered short-spacing. Note that the spacing is increased from 37.98 km at the licensed site.

WRJLFM	RSV 260C3	Eva	AL 187.4	170.40	162.5	7.90
WRJLFM	RSV 260C3	Eva	AL 187.4	170.40	162.5	7.90
WRJLFM	RSV 260C3	Eva	AL 187.4	170.40	162.5	7.90
WRJLFM	APP 260C3	Eva	AL 187.4	170.40	162.5	7.90
WAHR	LIC 256C	Huntsville	AL 186.7	115.86	104.5	11.36
WDJX	LIC 259B	Louisville	KY 11.4	286.65	271.5	15.15
WNAZFM	LIC-D 206A	Nashville	TN 325.1	41.48	24.5	16.98
WVLE	LIC 257A	Scottsville	KY 15.6	104.36	85.5	18.86
WRJLFM	LIC 260A	Eva	AL 187.4	170.40	151.5	18.90
WVLC	LIC 260C3	Mannsville	KY 37.7	188.28	162.5	25.78
WKDQ	LIC 258C	Henderson	KY 338.0	245.69	219.5	26.19
AL262	RSV 262C2	Meridianville	AL 191.2	115.02	88.5	26.52
WLAYFM	APP-N 262C2	Meridianville	AL 186.3	116.28	88.5	27.78
WNNX	LIC 259C0	Atlanta	GA 138.3	298.97	269.5	29.47
WYGO	LIC-N 258A	Madisonville	TN 100.1	187.35	151.5	35.85
WMC-FM	LIC 259C	Memphis	TN 257.4	316.71	280.5	36.21
WZRR	LIC-N 258C	Birmingham	AL 187.2	265.25	219.5	45.75
WPBX	LIC-N 257A	Crossville	TN 84.0	132.06	85.5	46.56
WVVR.C	CP -D 262C	Hopkinsville	KY 319.9	162.76	104.5	58.26
WVVR	LIC 262C	Hopkinsville	KY 319.9	162.76	104.5	58.26
WLAYFM	APP 262C1	Tuscumbia	AL 222.4	161.61	93.5	68.11
WLAYFM	LIC 262C1	Tuscumbia	AL 222.5	161.62	93.5	68.12
WHSX	LIC 256A	Edmonton	KY 32.1	156.60	85.5	71.10



E7C 259C0 LINE OF SIGHT TO HENDERSONVILLE

Earths Curvature = 1.33



Starting Latitude: 35-50-07 N
Starting Longitude: 086-29-30 W

End Latitude: 36-18-17 N
End Longitude: 086-37-12 W

Distance: 53.355777382 km
Bearing: 347.524 deg

Transmitter Height (AG) = 463.3 m
Receiver Height (AG) = 9.1 m

Transmitter Elevation = 192.8 m Topo
Receiver Elevation = 154 m Topo

Frequency = 99.7 MHz
Fresnel Zone: 0.6

E7D

WWTN GAIN AREA
Latitude: 35-50-07 N
Longitude: 086-29-30 W
ERP: 100.00 kW
Channel: 259
Frequency: 99.7 MHz

GAIN AREA = 64,285/2,049.5

088-00-00 W
36-00-00 N

087-00-00 W

086-00-00 W

085-00-00 W

WWTN
WWTN

LOSS AREA = 0

35-00-00 N

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Scale 1:1,250,000
0 10 20 30 km

Exhibit 1

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January 13, 2006

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Request for Withdrawal of Construction Permit Application and
Re-Classification of FM Broadcast Station
Cumulus Licensing LLC
Station WWTN(FM), Manchester, Tennessee
Facility Identifier Number: 31476
File Number: BPH-20040827ACB**

Dear Ms. Dortch:

Transmitted herewith on behalf of Cumulus Licensing LLC ("Cumulus"), licensee of Station WWTN(FM), Manchester, Tennessee, are an original and two copies of its Request for Withdrawal of Construction Permit Application and Re-Classification of FM Broadcast Station. Cumulus is withdrawing the WWTN pending construction permit application BPH-20040827ACB and, in doing so, realizes that Station WWTN will be re-classified as a Class C0 station.

If there are any questions about this Request, please contact undersigned counsel for Cumulus Licensing LLC.

Sincerely,


Mark N. Lipp

CERTIFICATE OF SERVICE

I, Diana Gonzales, in the law firm of Vinson & Elkins, do hereby certify that I have on this 13th day of January, 2006, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Petition for Reconsideration**" to the following:

* Rolanda F. Smith
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
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Blue Chip Broadcasting Licenses II, Ltd.
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Cincinnati, OH 45202
(Licensee of WIZF)

Hoosier Public Radio Corporation
Indiana Community Radio Corporation
Jennifer Cox-Hensley
Martin Hensley
15 Wood Street
Greenfield, IN 46140

Rodgers Broadcasting Corporation
2301 West Main Street
Richmond, IN 47374


Diana Gonzales

* HAND DELIVERED